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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 815

In the Matter

of the

Petition of SKIBS A S JOLUND, as owner of the M S BLACK GULL for exoneration from of limitation of liability.

SKIBS A S JOLUND,

Petitioner,

vs.

AMERICAN SMELTING & REFINING COMPANY, ATKINSON HASERICK & CO., *et al.*,

Respondents,

MARIA VERBEECK, *et al.*,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION OF SKIBS A/S JOLUND FOR CERTIORARI

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I

At page 2 of their brief, respondents say that the petition is premature, and at page 8—"we find it difficult to understand why either petitioner feels that this Court

should grant a petition for certiorari to consider this case in its present posture."

In its present posture this case stands for the proposition that an ocean carrier must prove with respect to every fire at sea that it could not have resulted from the carrier's personal neglect—a complete reversal of the rule, in effect for more than one hundred years, as to burden of proof in fire cases. This decision, if sustained, would seriously affect every contract in ocean shipping and call for a complete revision of fire insurance coverage.

In its present posture this case says that carriers may be required to substitute for the long-continued practice of carrying naphthalene on deck uncovered a method of covering with tarpaulins; despite the practice proven by undisputed testimony of competent seamen and stevedores that uncovered is the best and safest stowage, and that coverage with tarpaulins is highly dangerous. Right now cargoes are going to sea regularly, stowed in violation of what the Court of Appeals says is a standard of due care, a standard arrived at by the Court of Appeals on the basis of an erroneous and unsupported reading of a Coast Guard regulation.

Petitioner believes that it is vitally important to the shipping industry and urgently necessary for safety at sea that the opinion of the Court of Appeals in this case be reviewed and corrected at the earliest possible time.

II

It is clear as set out in our petition that the Court of Appeals reversed the trial judge because he failed to consider whether tarpaulins could *possibly* have prevented the fire. In effect, the Court of Appeals holds that if the evidence shows an act of the carrier which might *possibly* have been the cause of the fire, the court may infer that it was the cause and hold the carrier liable.

In answer to our position that this is a violation of the established rule as to the burden of proof, respondents state (brief, p. 8)—"Both courts below and the present respondents have always recognized that it is cargo's burden to prove that its destruction by fire was casually related to the negligence of managing officers of the vessel-owner or character." We suggest that what the court and respondents "recognize" in writing as being the law is of no importance where the actual holding of the court is in violation of and direct conflict with that law. The question here raised as to the court's holding is purely a question of law, and is one of vital importance to all shipowners.

III

In the last paragraph of page 6 of their brief in opposition, respondents state—"The Court of Appeals held that United States Coast Guard Regulations and a Dutch Regulation, established by the evidence as controlling, provide a standard of due care (24a)." Certainly respondents can not contend or mean that there was violation of any regulation having the force of law, for the Court of Appeals expressly denied this in the third from the last sentence of its opinion on the petition for rehearing (p. 32a).

(1) The Coast Guard Regulations.

These are quoted by the Court of Appeals (Opinion, p. 19a) as follows:

> "146.03-34 (b) On deck protected means the articles may be stowed on the open weather deck of a vessel. It is required that dangerous cargo stowed under such conditions shall be protected from the elements by structural erections or from the direct rays of the sun by means of awnings or dunnaging."
>
> "146.27-6. Protection for 'on deck' stowage. Hazardous articles that are permitted stowage 'on deck in open' or 'on deck protected' may be protected by the use of structural erections, awnings, or tarpaulins."

By these regulations, said the Court of Appeals (19a—1st paragraph) the stowage of naphthalene "is required to be under cover". On page 7 of the brief in opposition, respondents state that the Coast Guard Regulation "clearly required that a deck load of naphthalene be covered by awnings, dunnage or tarpaulins."

A simple reading of the regulations themselves shows that both the Court of Appeals and respondents' counsel have changed the word "protected" to the word "covered", and have completely ignored the permission to protect by structural erections, which was the method followed in the case of the *Black Gull*.

We said in our petition, and say again, that the statement that the regulations require a deck load of naphthalene to be under cover is a distortion of the clear words of the regulations. We have no hesitancy in saying this because its truth is established by the action of the Coast Guard itself. The undisputed evidence shows hundreds of voyages over a period of years with deck loads of naphthalene uncovered, and that at no time had the Coast Guard, charged by law with enforcing its regulations, found any violation or impropriety in such uncovered stowage. The Coast Guard security officer charged with enforcing the regulations in New York harbor, called as a witness by cargo respondents, gave not one word of testimony of violation of any regulation, or of criticism of the *Black Gull* stowage (A.A. 387a).

(2) The Dutch "Regulation".

The Court of Appeals (22a) says that there is evidence of a Dutch regulation "in effect when the vessel left Rotterdam". Respondents' brief in opposition (page 7) states that this is established by a letter (Exhibit W). The evidence clearly establishes that no regulation concerning naphthalene is or ever was "in effect" under Dutch law unless published in official publications. Exhibit W, offered in rebuttal by petitioner under a special, agreed arrange-

ment, disproves any regulation, and says that the so-called regulation contended for by respondents to protect naphthalene from rays of the sun "is going to be published". To hold that this or any other exhibit establishes a standard of care is exactly like saying that a driver may be arrested for speeding because someone has written a letter saying that the speed limit is going to be lowered. We cite below the record*.

The alleged Dutch regulation is that naphthalene be "protected from the rays of the sun". What possible casual connection there could be between the rays of the sun and

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* Cargo respondents (opposition brief p. 7) say they find it "strange" we say there was no Dutch regulation in view of Petitioner's Exhibit W. Any fair or proper view of the record clearly disproves existence of any Dutch regulation concerning naphthalene, and Exhibit W was offered to disprove, and did disprove, such a regulation. This is what occurred: In cargo respondents' case, that party offered letters, clear hearsay, written about two years after the *Black Gull* fire by uncalled witnesses to cargo agents, and the court sustained petitioner's objection. (P.A. pp. A63-64). Later, during petitioner's defense case, cargo attorneys again endeavored, and again, unsuccessfully, to have its letters received; and when the court adhered to its prior ruling, the cargo proctor then accepted petitioner's offer to waive the objection on the understanding and agreement that similar hearsay letters could be received in rebuttal (P.A. 312; typewritten minutes pages 850 to 862). Thereupon attorneys for cargo respondents (then libellants) offered Exhibits 35 and 45B—written as stated long after the *Black Gull* fire by and to uncalled witnesses—were received. To *disprove* them and *disprove* existence of the alleged Dutch regulation Petitioner's Exhibit W was offered and received in refutation of Exhibits 35 and 45B, under the agreement mentioned (A.A. p. 489a). Exhibit W disproves the alleged regulation, for it shows that even in May 1954 the alleged regulation had not been published, but merely was "going to be published" (A.A. p. 489a). All the Dutch lawyers who testified, including cargo respondents' witness Beerman, conceded that a regulation to be adopted or become effective must be published (Van Rossem P.A. p. A318; Blusse P.A. pp. A330-1-2; Beerman A.A. p. 205a). Cargo respondents fail in their opposition brief to mention either Petitioner's Exhibit X (P.A. p. A427) a letter from the Rotterdam Harbor Master which clearly and unequivocally states there was no Dutch rule or regulation; or Petitioner's Exhibit V (P.A. p. A426), a letter from the Dutch Inspector of Shipping at the Hague, which states that neither the alleged regulation referred to by cargo respondents nor any other had ever been published.

a fire which first broke out at 11:10 p.m. at night, is not explained by either the court or respondents. Even if there had been a violation of an effective or controlling statute, which the Court of Appeals recognizes is not the case, it would not avail cargo here under the Court of Appeals' own rule. In *The Automobile Insurance Co.* v. *United Fruit Co.*, 224 F. 2nd 72, a violation of a regulation was proved, but was not established as the cause of the fire. The Court of Appeals said at page 75:

> "We think it significant that no court has applied the doctrine of statutory fault in a case involving the exemption provided by [the fire] statute. We are unwilling to allow a presumption supplied by the doctrine of statutory fault to substitute for proof of cause required by statute."

At the top of page 7 of their brief, respondents refer to "the testimony of the opinion witnesses" who were "persuaded" to testify. The reference is to the twelve experienced witnesses whose testimony we reviewed at page 15-16 of the petition. These are not opinion, but factual, witnesses. Their unanimous and undisputed testimony established an open practice continued over a period of more than 30 years of uncovered stowage of naphthalene which no authority, United States, Dutch or other has ever questioned.

We respectfully submit that the manifest errors of the Court of Appeals in this case call for reversal in this Court, so that the decree properly entered by the District Court may be reinstated.

March 14th, 1958

Respectfully submitted,

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